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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 831

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

LITTLE ROCK PACKING COMPANY, CHRIS FINKBEINER AND OTTO FINKBEINER, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on February 25, 1953.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 74–84)[1] are reported at

[1] The record for purposes of this petition is in two volumes—the main record in the court below (referred to here as "R.") and the supplemental record of appellees (respondents) (referred to here as "Supp. R."), at the end of which the proceedings in the court below are bound.

104 F. Supp. 527. The opinion of the Court of Appeals (Supp. R. 40–46) is reported at 202 F. 2d 234.

JURISDICTION

The judgment of the Court of Appeals (Supp. R. 47) was entered on February 25, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Respondents' pay plan for each of their office employees provided a fixed hourly rate of pay for the first forty hours of work in a workweek and one and one-half times that rate for any additional hours of work, with a guarantee that the employee's total earnings for a week's work would be not less than a specified amount. In actual operation, no employee ever worked in excess of the maximum weekly hours covered by the guarantee or was ever paid in excess of the guarantee, so that there was never any occasion to rely on the stipulated hourly rate in determining the overtime compensation actually paid. Each employee was paid the specified weekly guarantee regardless of the varying number of overtime hours worked. In a few isolated instances when an employee did not work every day of the scheduled workweek, he was paid a pro rata percentage of the weekly guarantee for each day worked, rather than at the stipulated hourly rate. No attempt was made to record the

number of overtime hours actually worked. Respondents, with the few above-mentioned exceptions where a full workweek was not worked, simply recorded the number of hours needed to equal the maximum weekly number covered by the guarantee, their records in this respect being admittedly in violation of the record-keeping requirements of the Act.

The first question presented is whether the stipulated hourly rate was the true "regular rate" for the purposes of the overtime requirements of Section 7 of the Fair Labor Standards Act.

2. Whether a permanent injunction against further violations of the Fair Labor Standards Act is properly vacated notwithstanding admitted recent violations of the injunction, and in the absence of a showing of any changed circumstances or special hardship.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, are set forth in the Appendix, *infra,* pp. 27–29.

STATEMENT

The present proceedings arose out of an action brought initially by the Administrator of the Wage and Hour Division to enjoin respondents from violating specified provisions of the Fair Labor Standards Act. After a full trial, judgment was entered on September 14, 1942, perma-

nently enjoining respondents from future violation of the overtime compensation, the record-keeping, and illegal shipment provisions of the Act (R. 14–15). No appeal was taken from this judgment (R. 9).

The contempt petition, filed October 24, 1951 (R. 88), complained of violations of the overtime compensation and record-keeping provisions of the injunction as to office employees, and sought an order requiring respondents to pay these employees the amounts withheld from them in violation of the injunction and to compensate the Government for the expense of investigating and litigating the contempt proceeding (R. 1–7). The response denied any violations and prayed that respondents "be relieved of the injunction * * * for the reason that said injunction is unduly burdensome and onerous," and because of the alleged compliance with the injunction (R. 16–17).

As the Court of Appeals stated, "There is no dispute in the evidence" (Supp. R. 42). The parties have stipulated that the provisions of the Act have been applicable to each of the employees in issue during all of their employment subsequent to the issuance of the injunction (R. 51, 72–73). Each employee has worked under an arrangement involving a specified hourly rate of pay for the first forty hours of work each week, one and one-half times that rate for extra work, and a guarantee that the total earnings for a week's

work would be not less than a specified amount, generally the amount that would be due at such rates for 50 hours of work, regardless of the number of hours actually worked (Fdgs. 7, 8, R. 79–80).[2] With a few isolated exceptions, each employee has been recorded as having worked the full number of hours covered by the guaranteed amount (R. 21–41). It is conceded (Fdg. 7, R. 79) and found (Fdg. 8, R. 80) that these records have not accurately shown the actual number of hours worked (R. 46, 20).

No employees worked in excess of the hours recorded (Stip., R. 72–73), and none ever received pay in excess of the guaranteed weekly salary (R. 21–41). There was, therefore, never any occasion to rely upon the stipulated hourly rate in determining the overtime compensation actually paid. On the only other occasion when the stipulated hourly rate might have been given some operative effect, it was disregarded. Thus, in the few isolated instances when an employee did not work every day of the scheduled workweek, he was paid a pro rata portion of the weekly guarantee for each day worked, rather than at the stipulated hourly rate, and part of his pay was credited on the records as overtime even though no overtime was worked (Exhs. E, I, and J, R. 37, 39, 41).

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[2] At various times, the guarantees for various employees have been changed from 50 or 51 hours to 46, 47, or 48 hours (Exhibits A, B, R. 21–35).

The undisputed evidence also shows that when the statutory minimum wage was increased to 75¢ by the 1949 Amendments to the Act, respondents arbitrarily reduced the total number of recorded hours by an hour or two, so that the payroll increase directly attributable to the increased minimum wage would have little, if any, impact on any employee's previous compensation (R. 68). For example, when it was necessary to increase one employee's hourly rate from 64¢ to 75¢, *i. e.*, a 17% increase, her total pay was increased only from $35.20 to $36.75, or only 4%, although her actual working hours remained the same (R. 33, 45; and see Exhs. G, L, and Q).

At the close of the evidence in the contempt proceeding, the district court concluded that the overtime provisions of the injunction and the Act were not violated by the plan used by respondents subsequent to the injunction (Concl. 3, R. 84). The court recognized that the record-keeping practices violated the injunction, imposed a fine of $1, and ordered defendants to pay $400 to the Government for the expense of investigating and prosecuting the contempt proceeding (Fdg. 9, R. 81; Concl. 4, 5, R. 84). It further concluded that the testimony and "attitude, manner, and demeanor of the officers and employees" gave "no reason to believe" that there would be "future violations of the Act" (Fdg. 12, R. 83). It concluded that "under the circumstances" it would

be "unjust and inequitable, as well as unnecessary, to retain the injunction in force any longer, and that it should be dissolved" (Fdg. 12, R. 83).

The Government appealed from that part of the decree (R. 85–86) which (1) failed to adjudicate appellees in civil contempt for violating the overtime compensation provisions of the injunction, and (2) vacated the injunction. Respondents did not appeal the contempt adjudication. The court of appeals affirmed, ruling (1) that although the payroll records were "technically inaccurate because failing to show the number of hours actually worked," respondents' pay plan was valid (Supp. R. 46), and (2) that the district court "did not abuse its discretion in vacating the injunction" because "the errors in the payroll records" pertained only to a relatively few of respondents' employees and these errors were found by the district court to be "the result of an honest but mistaken belief * * * that the records as kept were in full compliance with the Act," and were not likely to recur in the future (Supp. R. 46).

REASONS FOR GRANTING THE WRIT

[1(a)] In sanctioning a wage plan under which the purported hourly rate of pay never in fact serves as a basis for computing the employee's earnings, the decision below represents a substantial departure from basic principles established by this Court for determining the "regular rate"

on which the overtime requirements of the Fair Labor Standards Act depend. Several decisions of this Court between the years 1942 and 1948 carefully delineated the limitations on the scope of the so-called *"Belo"* case (*Walling* v. *Belo Corp.,* 316 U. S. 624, rehearing denied, 317 U. S. 706). In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (decided the same day as the *Belo* case) and in six subsequent decisions, this Court, recognizing the potentialities for abuse of the *Belo*-type contract to circumvent the statutory overtime requirements, has repeatedly emphasized the principles underlying, and the narrow application of, the *Belo* decision. *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, rehearing denied, 326 U. S. 804; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427; *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *149 Madison Avenue Corp.* v. *Asselta,* 331 U. S. 199, modified on another point, 331 U. S. 795; *Walling* v. *Halliburton Co.,* 331 U. S. 17; *Bay Ridge Co.* v. *Aaron,* 334 U. S. 446.

This line of decisions has made it unmistakably clear that the requirements of Section 7 of the Act are not met simply by setting up a *Belo*-type plan on the employer's books. The *Belo* decision did not sanction a contract which stipulates "a fictitious regular rate consisting of a figure somewhat lower than the rate actually received" (*Walling* v. *Helmerich & Payne,* 323 U. S. at 41–42), or an "arbitrary" contract rate

when the employees "do in fact regularly receive the higher rate" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. at 430–431), or a contract "regular rate" which "is never actually paid" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. at 425).

These decisions, squarely applicable here, make clear that the ostensible hourly wage of the employees in this case, because it was not in fact the "regular rate" on which their pay was computed, did not effect compliance with the Act. The employees in this case never worked enough hours to earn more than their salary guarantee; their ostensible hourly rate of pay was thus never effective as a basis for computing overtime. And, demonstrating sharply that the hourly rate was a fiction, the employer automatically credited each employee each week with the number of hours of work required to earn the guarantee, ignoring the number of hours actually worked.

In only one of the above six decisions of this Court rendered since the *Belo* decision has the stipulated hourly rate been held to be a valid or actual "regular rate." That one case is *Walling* v. *Halliburton Co.*, 331 U. S. 17. A determining factor in both the *Belo* and *Halliburton* cases was that the stipulated hourly rate was actually operative in computing and determining the amount of compensation actually paid and that employees frequently earned in excess of the weekly guar-

antee by application of the stipulated hourly rate. In both of those cases there was, therefore, tangible evidence that the stipulated hourly rate, and not the weekly guarantee, actually determined the compensation paid the employee. In the *Halliburton* case the hourly rate determined the compensation paid in 20% of the workweeks (331 U. S. at 21), and in the *Belo* case the hourly rate was similarly determinative in a substantial but unspecified number of workweeks (316 U. S. at 631–632). This significant factor was fully discussed in the *Halliburton* opinion, and specifically noted as a reason for the *Belo* decision:

> In Belo itself, the specified basic hourly rate was held to be the actual regular rate because, as to weeks in which employees worked more than 54½ hours, the specified rate determined the amount of compensation actually payable [331 U. S. at 22].

The court below expressly recognized that under this Court's decisions "Contracts of employment in which the stipulated hourly rate bears no relation to the compensation guaranteed by the contracts are violative of the Act" (Supp. R. 45). But the basis on which the court distinguished the instant case would make that standard of validity meaningless. For the court apparently concluded that the requisite relation existed here between the stipulated hourly rates and the guaranteed salary solely because the amounts an em-

ployee would ordinarily earn at the stipulated hourly rate were not much less than the guarantee. But when the employee always receives his fixed salary, and never anything in addition for his varying periods of overtime work, it obviously means nothing to him or to his employer whether the disparity between his earnings at the hourly rate and at the guarantee is great or small. To distinguish between the cases where the hourly rate is absurdly low in relation to the guarantee and the cases, such as this one, where the hourly rate produces earnings more nearly equal to, but never exceeding, the guarantee, is to have the cases turn simply on the skill of the contract draftsman in arithmetic calculations, rather than on the single material question—whether the hourly rate is in fact the basis for compensation. The standard of reasonable relationship between the hourly rate and the guarantee has meaning only if the relation is such that, as applied to the range of the employees' actual weekly working hours, the hourly rate, at least sometimes, has real effect in measuring compensation paid by producing earnings in excess of the guarantee. Obviously, if the employee always works the same number of hours each week, there is no occasion for recourse to a *Belo*-type plan, for hourly rates without any guarantee will produce a uniform weekly income. Just as a guarantee is meaningless in such a situation, where there is no varia-

tion in working hours, so the stipulated hourly rate is meaningless if the working hours, even though varying somewhat, never fluctuate high enough for the hourly rate to produce more than the guarantee.[3]

Not only do respondents' contracts lack the two vital factors present in *Belo* and *Halliburton* (an actually operative hourly rate and accurate

[3] Added by the Act of October 26, 1949, Section 7 (e) of the Fair Labor Standards Act, codifying, with no presently material qualification, this Court's decisions defining the limits of a valid *Belo*-type pay plan (see *infra*, pp. 16–17), provides (63 Stat. 912, 29 U. S. C., Supp. V, 207 (e)):

"No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

The express restriction of such plans to employees whose duties "necessitate irregular hours of work," reflects the assumption that any valid plan with a true "regular rate" will sometimes produce earnings in excess of the guarantee. This requirement of fluctuating hours obviously derives from the *Belo* and *Halliburton* cases which involved newspaper and oil field workers, respectively, whose duties called for widely varying hours. Thus, even apart from the requirement of a true "regular rate," it is doubtful whether a case involving such minor variations of hours as those in the instant case meets the express "irregular hours" requirement.

records of the number of hours actually worked), but there is further unmistakable evidence in the record of the artificial character of the stipulated rate. Thus, when the statutory minimum wage was increased from 40 to 75 cents per hour in January 1950, respondents arbitrarily manipulated the hours recorded on their books to avoid the impact of the increased statutory minimum. Respondents simply increased the stipulated hourly rates in their agreements, leaving the weekly salary guarantees virtually the same and reducing the number of recorded hours of work to a number which would produce earnings at the increased hourly rates equal to the substantially unchanged weekly salary guarantees. In actual fact this was simply a record transaction and there was no change in the working hours of employees. Indeed, the stipulated hourly rates were not even accorded any significance secondary to the guarantee. The undisputed evidence in the record shows several isolated instances where employees were not paid their full weekly guarantee when they did not work every working day of the scheduled workweek. In these cases, instead of paying at the stipulated hourly rate for the recorded number of hours, the employees were paid at the rate of one-sixth of the weekly salary for each workday worked.

b. The decision below conflicts in principle with the decisions of two other courts of appeals.

McComb v. *Roig,* 181 F. 2d 726 (C. A. 1); *McComb* v. *Sterling Ice and Cold Storage Co.,* 165 F. 2d 265 (C. A. 10). In both of those cases, contracts patterned on the *Belo-Halliburton* type of contracts were held invalid because the stipulated hourly rate was arbitrarily fixed with the design and result that it would rarely, if ever, actually control the weekly compensation paid. In both the *Roig* and *Sterling* cases the terms of the contracts were, in pertinent respects, virtually identical to the pay plans here. In the *Roig* case the First Circuit construed this Court's decisions as requiring that the stipulated hourly rate and the maximum number of hours covered by the guarantee, be rationally related to the range of weekly hours customarily worked so that the stipulated hourly rate is actually operative to produce earnings in excess of the guarantee with sufficient frequency to demonstrate that it is not wholly fictitious. Despite the fact that in occasional instances some of the employees in the *Roig* case happened to earn in excess of their guarantees, so that the contracts there were not as obviously fictitious as respondents' contracts here, the court nevertheless held the contracts invalid. Referring to what it regarded as the even more clearly unlawful type of plan involved in the instant case, the court said (181 F. 2d at 729–730):

> It is possible, of course, that the relation between the hourly rate and the guaranty might be set by the employer with refer-

> ence not to a roughly estimated average workweek but to what the employer supposes would be the maximum possible workweek. In such a case, if the employer's forecast proved accurate, the workers would never exceed their guaranties; the purported hourly rate would never control the amount of the weekly pay and would pretty surely be found to be fictitious. * * *

Since it is undisputed (Stip. R. 72–73; Fdg. 8, R. 80) that in "no case did any" of the employees in the case at bar "work in excess of the guaranteed hours" (Fdg. 8, R. 80), and the hourly rates were never operative to produce earnings in excess of the guarantees (R. 21–41), it is evident that the contracts in the instant case would be held invalid in the First Circuit.

The decision below also conflicts with the ruling of the Tenth Circuit in the *Sterling Ice* case that the failure to attach any significance to the number of hours actually worked by employees, together with the fact that the employees never received any overtime payment in excess of their weekly guarantees, established the fictitious character of the contract. In that case, as in the instant case, the employer attached no importance to the hours actually worked by employees because it was apparent to him that the employees did not work as many hours as the maximum number covered by the contract weekly guarantee.

The court of appeals, reversing the district court's finding that the hourly rates were true "regular" rates, reasoned, in terms directly applicable here (165 F. 2d at 270):

> * * * This would indicate that no significance was attached to the number of hours which the employees were required to work. The hourly rate expressed in the contract could have no significance unless an accurate account was kept of the number of hours actually worked. The fact that no such records were kept would indicate that the company attached no significance whatever to the contracts or to the hourly rate or to the provision in the contract for one and one-half times such hourly rate for hours in excess of the maximum permitted by the Act, and that it considered the monthly salary as the true wage. So also it further appears in this case that in not a single instance was overtime payment paid in addition to the weekly guarantee provided for in the contract or the sum representing the semi-monthly salary of the employee.

As the court below recognized (Supp. R. 46), the amendment to Section 7 by the Fair Labor Standards Amendments of 1949 (*supra,* p. 12, n. 3) did not change the requirement that the "regular rate" be a true and not a fictitious rate. The 1949 Amendments, in subsection 7 (e), gave statutory recognition to the *Belo*-type contract, subject to certain specified limitations. The

above-cited decisions all related to pay plans antedating the 1949 Amendments. However, it has been the generally accepted view, consistently held by the Administrator, and by the lower federal courts which have passed upon the question, that the new Section 7 (e) simply codified the *Belo-Halliburton* type of pay plan subject to the same principles and limitations which this Court's subsequent decisions placed upon such pay plans. See *Interpretative Bulletin, Overtime Compensation,* 29 C. F. R., Part 778, 13 F. R. 4534; *Beechwood Lumber Co.* v. *Tobin,* 199 F. 2d 878 (C. A. 5); and the unofficially reported decisions in *Tobin* v. *Morristown Poultry Co.,* 10 W. H. Cases 571, 21 Labor Cases, ¶ 66,798 (E. D. Tenn., 1952); *Tobin* v. *Keystone Mfg. Co.,* 10 W. H. Cases 636, 21 Labor Cases, ¶ 66,911 (W. D. Ark., 1952); *Shure* v. *Rubenstein Bros. Jewelry Co.,* 10 W. H. Cases 657, 21 Labor Cases, ¶ 66,899 (N. D. Ill., 1952); *Tobin* v. *Wenatchee Air Service, Inc.,* 10 W. H. Cases 680, 21 Labor Cases, ¶ 67,019 (E. D. Wash., 1952); *Tobin* v. *Ewbank,* 11 W. H. Cases 354, 22 Labor Cases, ¶ 67,411 (W. D. Tenn., 1952); *Tobin* v. *Anthony-Williams,* 11 W. H. Cases 181, 22 Labor Cases, ¶ 67,278 (E. D. Ark., 1952).[4]

[4] That it was the intent of Section 7 (e) to validate only those contracts which were valid under the *Belo-Halliburton* test is indicated by the statement of Rep. Lucas who summarized the bill as passed by the House of Representatives. He concluded that Section 7 (e) was intended to give "spe-

The instant case presents an important question, since undue expansion of the *Belo* principle opens up an easy avenue of escape from the overtime provisions of the Fair Labor Standards Act. The decision below, unreversed, will lead to this result, for it disregards the limitations contained in the *Belo* case itself, as well as in the many subsequent cases in this Court and the courts of appeals applying the *Belo* doctrine.

2. In vacating the injunction, the decision below conflicts with this Court's decision in *United States* v. *Swift & Co.*, 286 U. S. 106. The departure from the principles of the *Swift* decision is particularly unjustifiable in the instant case because of the admitted recent violations of the injunction. Even if it be assumed that respondents' pay plan was not in violation of the Act or the injunction, it is undisputed that respondents at least violated the record-keeping requirements

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cific legislative approval to Belo type contracts (upheld by the United States Supreme Court)." 95 Cong. Rec. A5476. This is also the view of the Chamber of Commerce of the United States. See *What the 1949 Wage-Hour Act Means*, Employer-Employee Relations Division, Washington, D. C., November 1, 1949, where after noting the facts of the *Belo* case, the authors state: "This type of agreement was legalized under the original Act, but severely limited by the courts * * *. The new law reaffirms these decisions * * *" (at p. 11). See also *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., C. C. H. Labor Law Journal, November 1949, p. 94. The author, after reviewing the *Belo*-type contract decisions, also reaches this conclusion. He states: "* * * it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute" (at p. 160).

during the years immediately preceding the filing of the contempt proceeding.

The court below upheld the dissolution of the injunction on the ground that the record-keeping violations "were the result of an honest but mistaken belief" that the records were being kept in compliance with the Act and that there was no likelihood that the errors would recur in the future, citing as authority only *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 421, rehearing denied, 326 U. S. 804, and *Tobin* v. *Alma Mills,* 192 F. 2d 133, 136 (C. A. 4), certiorari denied, 343 U. S. 933. This reasoning is plainly inconsistent with the governing principles of the *Swift* case, to which the court below made no reference whatsoever, and neither of the decisions cited justifies the dissolution of the injunction under the circumstances present here.

In *Swift,* this Court, reversing the lower court's relaxation of a permanent consent decree, entered over ten years earlier in antitrust proceedings, held that the discretion of a court of equity to remove restraints imposed by a final decree is limited. While recognizing the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions," this Court stated that a final disposition of litigation by permanent injunction "will not lightly be undone at the suit of the offenders," 286 U. S. at 114, 120. The opinion emphasized the need to keep "in mind steadily the limits of inquiry proper to the case,"

the Court specifically noting that: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree." 286 U. S. at 119. The scope of proper inquiry, said the Court, does not include "liberty to reverse under the guise of readjusting." *Ibid.* And general changes occurring merely by reason of the passage of time were expressly held inadequate grounds for relaxing the restraints. "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" (*ibid.*), said the Court, or a showing that the injunction "has been turned through changing circumstances into an instrument of wrong" (*id.* at 115), would justify removing the restraints.

Instead of requiring defendants to make a showing of tangible circumstances justifying release from the permanent decree, as required in the *Swift* case, the decision below would place upon plaintiff the burden of again proving affirmatively the need for an injunction as if an original decree were being framed.

The court's reliance upon *Walling* v. *Youngerman-Reynolds Co.*, 325 U. S. 419, makes it evident that it viewed the motion to vacate as if it presented the question of the need for an original injunction. The *Youngerman-Reynolds* decision, 325 U. S. at 421, held only that "voluntary discontinuance of an alleged illegal activity * * * may justify a court's refusal to enjoin future ac-

tivity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts." But the *Swift* case specifically holds that this is not the rule to be applied to a motion to vacate a permanent injunction issued previously because of the likelihood of continued violations.

The reliance by the court below on *Tobin* v. *Alma Mills,* 192 F. 2d 133 (C. A. 4), certiorari denied, 343 U. S. 943, was, we submit, also misplaced. The Fourth Circuit's decision in that case was predicated upon the assumption that "radical changes" in the ownership and management of the defendant corporation had occurred, and upon the court's finding that "the owners of the stock of the company wished to sell it and that the fact that the company was subject to the injunction was interfering with the sale" (192 F. 2d at 134). There was, therefore, some possible basis for the conclusion that the dissolution of the injunction was consistent with the principles of the *Swift* case. In the instant case, on the other hand, it is clear that no such changed circumstances or hardships are present. Respondents have made no pretense of showing "new and unforeseen circumstances" or any "extreme and unexpected hardships" or any of the conditions prescribed in the *Swift* case.[5]

[5] Respondents alleged that the injunction is "unduly burdensome and onerous" (Response to the Order to Show Cause, R. 17), and one of respondents testified that both he and his father had attempted to "get the company released"

The sound reasons underlying the *Swift* decision are equally applicable here. There are indeed special reasons for applying the standards of the *Swift* case to injunctions under the Fair Labor Standards Act. The injunction is the only remedy now available to the Government "to require divestiture of [benefits] unlawfully acquired" by non-complying employers. Cf. *Schine Theatres* v. *United States,* 334 U. S. 110, 128. This is the sole effective means for meeting one of the most difficult problems of enforcement of this Act—the problem arising from the fear on the part of complying employers, particularly in the highly competitive industries regulated by the Act, that their less law-abiding or less conscientious competitors will secure and retain substantial competitive advantage by periodic or sporadic noncompliance, whether intentional or not. As this Court has observed, the criminal remedies

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from the injunction "because a plant does not like to be operating under injunction" (R. 69). Such expressions hardly rise to the dignity of proof necessary to establish that the injunction is working "extreme and unexpected hardship" or that the decree has been converted into "an instrument of wrong." Indeed the refutation of the charge that the injunction is "unduly burdensome and onerous" is contained in respondents' own testimony that, notwithstanding the existence of the injunction, "we have built up a lot of good will in this state with our products and our company" (R. 69). The district court placed some emphasis on the fact that there had been no investigation of respondents "for nearly nine years" (Fdg. 12, R. 82–83). This fact, far from showing that the injunction was unduly burdensome, seems strong evidence to the contrary.

are "for willful violations—difficult to prove" (*Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 709). The effectiveness of the employee remedy is haphazard, depending upon the initiative of particular employees and their willingness to risk incurring the disfavor of their employers. The injunction is the sole reliable remedy under the Act to prevent a prior offender from retaining advantages accruing from subsequent negligent or unintentional noncompliance. And it is now clear that the injunction must be outstanding in order for the restitution remedy to be available.[8] The restitution remedy has been the most effective spur to general voluntary compliance because it reduces to a minimum the danger of an unfair competitive advantage through noncompliance. As this Court has noted, it effectively places upon the employer "the risk of crossing the forbidden line" even though a court might find that he "had no purpose to evade the decree." *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 192, 193.

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[8] The 1949 amendment to Section 17 of the Fair Labor Standards Act expressly deprives the courts of jurisdiction to order restitution in an original action by the Government for an injunction (29 U. S. C., Supp. V, 217, Appendix, *infra*, p. 29). The Conference Report on the compromise version of the 1949 amendments, which was enacted, explains that this amendment was not "intended in any way to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions" (H. Rep. 1453, 81st Cong., 1st Sess., p. 32).

Especially when it is considered that injunctions under this Act do not impose any restraint or obligation other than the basic requirements of the law impose in any event, the argument for more lenient standards fails. An injunction under this Act does not, as antitrust and other kinds of injunctions often do, impose restraints upon conduct that would under some circumstances be legal.[7] In such cases there is obviously more reason to relax restraints as conditions change.

The fact that in the instant case relatively few employees may have been affected and that the violations may have resulted from an "honest but mistaken belief" (a factor which apparently substantially influenced the court below), is not a sound reason for dissolving the injunction, as the *Swift* opinion itself demonstrates. In the *Swift* case, too, it was assumed that there were only "sporadic instances of unfair practices" which were "practices as to which the defendants' officers disclaim responsibility or knowledge." 286 U. S. at 118. Observing that "it is easy to make such excuses with plausibility," the Court ruled that "the difficulty of ferreting out these evils and repressing them when discovered supplies an

[7] Even though it appeared that the injunction in the *Swift* case imposed "restraints upon the exercise of powers that would normally be" within the defendant's legal rights (286 U. S. at 119), it was held an abuse of discretion to modify such restraints in the absence of "a clear showing of grievous wrong evoked by new and unforeseen conditions" (*ibid.*).

additional reason why we should leave the defendants where we find them" (*Id.* at 118–119). And respondents' good faith is obviously an even less valid reason for vacating the injunction than it would be for refusing to find civil contempt. See *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191; *McComb* v. *Norris*, 177 F. 2d 357, 359 (C. A. 4). In the *Jacksonville Paper Co.* case, this Court ruled that violation of an injunction constitutes civil contempt without regard to the question of whether the violations were intentional. "The absence of willfulness does not relieve from civil contempt * * *. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently" (336 U. S. at 191). *A fortiori,* the absence of willfulness is not a valid ground for relieving a contemnor from the restraint of a permanent injunction.

The extent of the additional enforcement problem created by the ruling below may be judged from the fact that there are over 6,000 injunctions outstanding, affecting less than 1% of the total number (over 700,000) of employer establishments covered by the Act. Since funds and personnel available for enforcement are, of course, limited and only a small fraction of the total number of covered establishments can be inspected, the inspection program must be most selectively planned. Because the pendency of an

injunction affords an added deterrent, it has in the past served as a dependable means of reducing the number of necessary investigations. The decision below, which sanctions unduly lenient standards for vacating injunctions, can seriously strain and disrupt the Department's available enforcement facilities.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

JETER S. RAY,
Acting Solicitor of Labor.

MAY 1953.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201, *et seq.*

MAXIMUM HOURS

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less that one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * * * *

INVSTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

Section 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

PROHIBITED ACTS

Sec. 15 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

INJUNCTION PROCEEDINGS

Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction for cause shown, to restrain violations of section 15; *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND THE UNITED STATES OF AMERICA, *Petitioners*,

v. No. 98

LITTLE ROCK PACKING COMPANY, CHRIS KIRSCHNER, AND OTTO FRIEDRICH, JR., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH DISTRICT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GROVER T. CURRAN,
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Attorneys for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND THE UNITED STATES OF AMERICA ..... *Petitioners,*

v. No. 93

LITTLE ROCK PACKING COMPANY, CHRIS FINKBEINER, AND OTTO FINKBEINER, JR. ..... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH DISTRICT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court consists of findings of fact and conclusions of law (R. 74, 84).[1] It is reported at 104 F. Supp. 527. The opinion of the Court of Appeals (S.R. 40-46) is reported at 202 F. (2) 234.

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[1]The record in the Court of Appeals comprises two volumes entitled "Record" and "Supplemental Record of Appellees." In this brief references thereto will be "R." and "S.R.", respectively.

JURISDICTION

The jurisdiction of this court has been invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Should this court review the findings of fact sustained by both lower courts to the effect that the hourly rate of pay stipulated in certain employment agreements was a bona fide rate agreed upon by employer and employee and used for the purpose of complying with the Fair Labor Standards Act and not to evade the act?

2. Should this court review a trial court's exercise of discretion in dissolving an injunction, which in general terms enjoins violations of the Fair Labor Standards Act, under circumstances indicating conscientious efforts by the employer to comply over a period of ten years, together with a manifest intent of the employer to continue compliance, particularly when the evidence discloses intemperate use of the injunction by the party at whose request it originally was granted?

STATEMENT OF THE CASE

The respondent, Little Rock Packing Company, is a small independent meat-packing company of Little Rock, Arkansas. The respondents, Chris Finkbeiner and Otto Finkbeiner, Jr., are the managing officers of the company. The founder of the company, Otto Finkbeiner, Sr., was an immigrant to this country. From an inauspicious start as a sausage peddler, by virtue of long hours of toil and constant savings, Finkbeiner, Sr., developed a meat-packing plant of substantial proportions for the community in which it was located. Like many others, in the early days of the Fair Labor Standards Act, Finkbeiner, Sr.. became involved with its perplexities, and, in 1942, the Wage and Hour Division secured an injunction enjoining the com-

pany and its officers and agents, in general terms, from violating the act.

Otto Finkbeiner, Sr., died in 1947 (R. 63), leaving the management of the business to his two sons, Chris and Otto, Jr., respondents herein.

After the injunction was granted in 1942, the Wage and Hour Division made no further examination of the company until its investigation of June, 1951, which gives rise to the present litigation (S.R. 10). The latter investigation was made as the result of an anonymous telephone complaint to the Wage and Hour Division, and not for the purpose of determining whether the company was complying with the court's injunction (S.R. 11). The investigation covered the entire period subsequent to the date of the injunction. No violations were found, except the alleged violations with respect to the office employees (S.R. 12, 23). The pay roll of these employees as compared to the entire plant pay roll was trivial (Finding of fact No. 10, R. 82).

The Wage and Hour Division complains of an employment arrangement whereby office employees were enabled to earn a fixed minimum amount each week. The Division does not contend that these employees worked during any period of time for which they were not paid; on the contrary, it contends that they were paid for periods of time when actually they were not at work (S.R. 17). The reason that the investigator thought there was a violation was the fact that the office employees were employed on a regularly scheduled work week of more than forty hours, and it was inconceivable to him that one person would work the same number of hours every week (S.R. 12). His Department has never approved a guaranteed weekly wage for any employee whose hours of work exceeded forty and who did not work precisely the same number of hours each week. (S.R. 18). To comply with regulations, the wage

of such an employee would have to vary each week in accordance with the hours worked (S.R. 18). It is assumed that the witness was quoting the views of his Department rather than personal opinions. If this be a correct assumption, it is clear that the Wage and Hour Division will brand as illegal any plan whereby employees are enabled to earn an amount certain each week.

During the entire period relevant hereto, the respondent company maintained detailed employment records. Each employee signed and entered his own work hours each day. Examples of these time records appear on Pages 33 and 35 of the Supplemental Record. On the basis of these time records, weekly wages were computed and extended on employment record forms of the type appearing on Page 31 of the Supplemental Record. During the years in question, the company had in its employ in December of each year a minimum of fifty-five employees and a maximum of one hundred and twenty employees (Finding of fact No. 10, R. 82). During the same years there were a minimum of one and a maximum of six office employees about whom complaint is made in this case. In December, 1951, the affected office employees had a total weekly pay roll of $310, while the entire plant pay roll was $5,800.

During the years 1942, 1943, and 1944, the office employees were on a regular fifty-hour schedule and were paid hourly wages based on fifty hours of work. They worked regularly eight and one-half hours per day, Monday through Friday, and seven and one half hours on Saturday (R. 46, 49).

In the meat-packing business it is customary to make collections each week for sales made the previous week (R. 47). It is therefore necessary for the office to prepare bills or statements prior to closing on Saturday for all sales made during the

current week so as to enable the salesmen to make collections beginning on the following Monday (R. 47).

Some time after 1944, in lieu of requiring all office employees to remain on duty until the scheduled closing hour on Saturday, the company instituted the practice of permitting the office employees to leave on Saturday when their work was completed (R. 49). The discontinuance of Saturday sales and deliveries (R. 64) also reduced the volume of office work to be performed on Saturday. The office manager told these employees that if they would speed up and complete their work ahead of schedule they, nevertheless, would receive a full day's pay (R. 47). The office employees continued, however, to record on their time records a full seven and one-half hours' work on Saturday, even though at times they did not work the full number of hours, and the company, pursuant to its agreement, paid them for the full day's work (Finding of fact No. 8, R. 80, 81). Each of the employees was familiar with the terms of his employment and was fully satisfied (Finding of fact No. 7, R. 79).

The president of the company explained that his plant was located at the east edge of the city, far removed from the business district, and that he did not feel that it was right or proper to ask his employees to come to work on Saturday if they could be paid for only two or three hours of work, and that, therefore, he continued to maintain the policy of paying for the full fifty hours of work whether or not that amount of work actually was required (R. 64).

Each of the office employees was hired on an hourly wage not less than the minimum required by the act; each knew and understood the terms of his employment; each knew that he was hired on an hourly rate and not on a weekly or monthly salary basis; and each knew that he was guaranteed a minimum number of hours per week (Finding of fact No. 8, R. 80).

Each of these employees had, in fact, worked on his own pay roll records from time to time (R. 56).

In the trial court, the petitioner did not endeavor to prove that the hourly wages of the office employees, when disassociated from the weekly guarantee, were not in line with the scale of wages being paid other employees in the community doing similar work. The petitioner asked the court to draw an inference based upon isolated record entries that the specified hourly wage was fictitious and that, in fact, the office employees were paid on a weekly basis. Neither the trial court nor the Court of Appeals thought the inference was justified, since it was contrary to all of the evidence introduced by the petitioner himself.

The petition for certiorari requests this court to review the factual issue as to the bona fides of the hourly rate stipulated in the employment contract. It further asks this court to review the propriety of the dissolution of the injunction rendered in 1942.

The trial court found that for a period approximating ten years prior to the date of the trial the respondents had in good faith endeavored to fully comply with the Fair Labor Standards Act and with the injunction previously rendered. It further found that the company had in all substantial respects actually complied with the act and the injunction; that the only deviation was its failure to record the actual hours or minutes of work each week performed by a trivial number of office employees, and that this violation was purely a technical one, it being stipulated by the parties that not one of the employees had actually worked longer than the number of hours credited to him each week. The court in its findings commented upon the fact that the present proceedings were, in the court's opinion, largely unjustified (Finding of fact No. 12, R. 83). The lower court felt that equity and justice required the disso-

lution of the injunction. The company had demonstrated over a long period of years its entire good faith. No doubt, the court was shocked by the fact that the Wage and Hour Division was determined to seek both civil and criminal penalties for a violation which to the court, at best, appeared trivial.

During the course of the investigation, the investigator recommended to the company various changes in record keeping methods, including the installation of a time clock and the removal of office employees from the guaranteed wage plan. The company immediately complied with every recommendation he made (S.R. 15, 26). The investigator received complete cooperation from the management (S.R. 25). He did not discuss with the company restitution of the presently alleged underpayments "because we don't discuss restitution if there is a potential litigation" (S.R. 22).

Following the investigation, the president of the company conferred with Mr. Hicks, head of the District Office of the Wage and Hour Division (R. 70). Mr. Hicks told him that he would have to take the matter up with the Regional Office at Dallas (R. 70). Mr. Finkbeiner make a trip to Dallas, where he was informed that the case was "too big" for the Dallas Office and had been forwarded to Washington. No effort whatever was made by the Wage and Hour Division to adjust this matter short of litigation. Although the respondents had manifested every intention to fully comply with the act and to cooperate with the Wage and Hour Division, it, nevertheless, insisted on filing suit for civil and criminal penalties, with the resultant adverse publicity to respondents.

In the light of these facts the lower court felt that justice and equity required dissolution of the injunction. The Court of Appeals affirmed.

ARGUMENT

[1a.] The petitioners contend that the stipulated hourly rate of pay under respondents' wage plan was not the true regular rate of pay. The determination of this issue involves only the determination of questions of fact. Both lower courts resolved the issues of fact adversely to petitioners. The opinion of the Court of Appeals makes it clear that petitioners' argument is based solely upon an inference drawn from the company's pay roll records, which inference is directly opposed to the testimony of every witness (S.R. 43). The inference also is rebutted by petitioners' stipulation that Irene B. Ellis, one of the respondents' office employees, was properly paid (R. 73). She, too, worked under the weekly guarantee. The hourly rate of Irene B. Ellis was necessarily a bona fide hourly rate, since it is stipulated that she was properly paid. No explanation is offered by petitioners to reconcile the inconsistency of their position with reference to different employees in the same employee group working under identical wage plans.

Petitioners' contention is that a specified hourly rate under a guaranteed wage plan is always fictitious if the affected employee is never permitted to work more than the guaranteed hours of work. To support this contention reliance is placed on the following decisions: *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427; *Walling* v. *Helmerich & Payne*, 323 U.S. 37; *149 Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199; *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446.

These cases are wholly dissimilar to the case at bar. The *Youngerman-Reynolds* and *Harnischfeger* cases involved piece rate wage plans; the *Bay Ridge* and *Helmerich & Payne* cases, split pay plans. *149 Madison Avenue Corp.* v. *Asselta* involved a formula plan which, in fact, was not followed by the parties.

In the latter case, Mr. Chief Justice Vinson stated (331 U.S. 209):

> "This is not a case like *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624, 86 L. Ed. 1716, 61 S. Ct. 1223, supra, or *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, ante, 1312, 67 S. Ct. 1056 (1947). Unlike those cases there was here no provision for a guaranteed weekly wage with a stipulation of an hourly rate which under the circumstances presented could properly be regarded as the actual regular rate of pay."

The only cases cited by petitioners that involve pay plans similar to that presented in this case are the *Belo*[2] and *Halliburton*[3] cases, and neither of these cases imposes as a condition to validity the requirement that employees receive more wages than the guaranteed minimum.

Mr. Justice Frankfurter, in a concurring opinion in the *Harnischfeger* case, said (325 U.S. 433):

> "Nor does the act bar an agreement establishing an hourly 'regular rate' that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities."

The cases cited by petitioners, regardless of the result reached, indicate that the validity of guaranteed wage plans depends upon the particular facts of the case presented. The test applied is whether the stipulated hourly rate is a mere artifice unrelated to wage earning actualities. There is not one word of testimony in this case to support the contention that the stipulated rate never, in fact, served as a basis for computing the employees' earnings. Apparently overlooked was that portion of finding of fact No. 8 (R. 80), reading as follows:

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[2]Walling v. A. H. Belo Corp., 316 U.S. 624.
[3]Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17.

> "The court further finds that in certain cases such employees actually worked the full number of guaranteed hours; that they were always subject to being required to work the full number of guaranteed hours, and that they always worked such number of hours when it was necessary to complete the week's work."

It is indisputable that in every instance where an employee worked the full scheduled work week the stipulated hourly rate did, in fact, serve as the basis for computing his earnings.

The president of the company explained why the company felt it necessary to have a weekly guarantee for its office employees. The company's plant is located in the extreme eastern area of the city, far removed from the shopping district, and probably a great distance from the residences of the office employees (R. 64). During certain seasons business is slack and there is not always a substantial amount of work to be done on Saturday. Nevertheless, it is necessary for this work to be performed. The company did not feel that it was fair to call its office employees to the plant on Saturday if the company could pay them only for an hour or two of work (R. 64). The weekly guaranteed minimum wage plan enabled the company to pay these employees for a full shift on Saturday, even though the business of the company was insufficient to provide a full day's work. The evidence is clear that the guaranteed wage was instituted for the benefit of the employees, and that it resulted in larger earnings to employees than otherwise could have been paid. There is not one hint in the record in this case that the plan was instituted by the employer to evade any of its responsibilities under the Fair Labor Standards Act.

This was not a plan that was "merely set up on the employer's books," as petitioners suggest. This plan was brought to the attention of each of the employees and each of them approved of it and benefited from it (Finding of Fact No. 7, R. 78, 79).

Petitioners charge that respondents "simply recorded the number of hours needed to equal the maximum weekly number covered by the guarantee." This is not an accurate statement. The records of hours worked were kept by each of the affected employees, not by the employer, save and except to the extent that the employer maintained the records so made by its office employees. These same employees extended and computed their own pay roll checks in accordance with the hours of work reported by them (R. 56).

Petitioners mentioned in their petition certain discrepancies in the pay roll records. These discrepancies were brought to the attention of the trial court and also the Court of Appeals. Upon the basis of these discrepancies, which petitioners admit are isolated, they ask the court to infer that the stipulated hourly rate was fictitious and was not, in fact, used as a basis for determining the pay of the affected employees. Neither of the lower courts thought this inference justified in view of the positive testimony in the case and in view of other entries in the pay roll records which pointed to the bona fides of the stipulated hourly rate.

The 1949 amendments to the Fair Labor Standards Act have removed many of the perplexities that existed under Section 7 of the act. Section 7 (e) of the act provides (29 U.S. C.A. 207 (e)):

> "(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 206 (a) of this title and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of

pay for not more than sixty hours based on the rates so specified."

The employment agreements involved in this case appear to meet all of the requirements of the statute; (1) the duties of the employees necessitated irregular hours of work; (2) the agreement specifies a regular rate of pay not less than the minimum provided in Section 6 of the act and not less than one and one-half times that amount for hours in excess of forty; and (3) the agreement provides for a weekly guaranty of pay for not more than sixty hours based on the rate so specified.

Petitioners seek to add a fourth requirement, to-wit, that the plan will sometimes produce earnings in excess of the guaranty (see footnote 3, page 12 of petitioners' brief). Had Congress intended any such additional requirement, it is reasonable to assume that the requirement would have been incorporated therein.

Petitioners suggest that the 1949 amendments are mere codifications of the various decisions on Belo-type contracts. Since we believe the employment agreements in the present case are valid under prior decisions of this court, it probably is unnecessary to determine this issue in this case. However, we submit that petitioners' contention in this respect is not justified. Congress apparently was endeavoring to eliminate the uncertainties created by various rulings and interpretations of the Wage and Hour Division and by the decisions of the courts. One of the prime purposes of the amendments was to remove the perplexities caused by the term, "regular rate" as used in Section 7 of the act. The amendments exclude from the regular rate certain payments that the courts and the Administrator of the Wage and Hour Division previously had included in computing regular rates under varying circumstances. Thus, the employment agreement held to violate Section 7 of the act in *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, is not

a violation of Section 7, as amended. Therefore, the amendments did do more than merely codify the principles announced by this court in the various decisions dealing with guaranteed wage agreements. The amendments, in fact, changed the law as previously construed by the courts.

We believe it clear that Congress, by Section 7 (e), intended to provide a method by which an employee whose hours of work were irregular could receive a fixed, certain weekly sum of money for his labors, even though on a strict hourly calculation he might not be entitled to the sum received. The desirability, from an employee's standpoint, of a steady income need not be expounded. Despite the benefits thus derived by employees, the Wage and Hour Division has uniformly contested the validity of such arrangements. We submit that Congress was endeavoring to remove the uncertainties attendant upon such wage plans in order that an employer might safely accommodate his employees.

If, as suggested in footnote 3 at page 12 of petitioners' brief, the hours of work of respondents' office employees were not "irregular hours of work," then it is submitted that the sums received by them for hours they did not work are "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work" and are permissible under Section 7 (d) (2) of the act.

[b.] There is no conflict between the decision below and the decisions in *McComb* v. *Roig*, 181 F. (2) 726 (C.A. 1), and *McComb* v. *Sterling Ice & Cold Storage Co.*, 165 F. (2) 264 (C.A. 10). The facts in these cases do not even closely resemble the case at bar. In the *Roig* case, the court found as a fact that there was no reasonable relation either on an individual or on a group basis between the weekly guarantees and the hourly rates of the workers in question. In the *Sterling Ice* case, the court found that neither employer nor employee at-

tached any significance to actual hours of work. No such findings were either made or justified in the case at bar. These decisions merely reflect that each case is tested on its own facts and that no hard and fast rule can be laid down as a test in these cases.

Petitioners have failed to mention in their brief the case of *McComb* v. *Pacific & Atlantic Shippers Ass'n*, 175 F. (2) 411 (C.A. 7), which on its facts is almost identical with the case at bar and which resulted in a decision adverse to petitioners' present contention. The opinion in the case last cited reflects that the employees received a guaranteed minimum wage based on a forty-eight hour week, and that "the number of hours worked by these employees was less than forty-eight hours in any week." The court there held that there was no basis in fact for the contention that the employer had devised an artificial method of payment or that its agreement with its employees was not bona fide. The court remarked that the method of compensation not only was understood by the employees, but was satisfactory to them and was utilized for compliance with and not for evasion of the requirements of the act. The lower courts in the case at bar made similar findings.

It is submitted that there is no conflict in the decisions of the various Courts of Appeal on the issues presented in this case. Each case presents a question of fact for determination and, despite the results reached in the various cases on varying sets of circumstances, the lower courts in the case at bar have applied the same legal principles that have been announced by this court from time to time.

2. The vacation of the injunction does not conflict with this court's decision in *United States* v. *Swift & Co.*, 286 U.S. 186. There the injunction forbade certain specific acts. Here the injunction is in general terms, forbidding violation of an act technical in nature and attended by such perplexities that

the members of this court are not always in agreement concerning its interpretation.

The decision in *Swift* recognizes that "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." 286 U.S. 114, 115.

The propriety of an injunction couched in such indefinite terms as that in the case at bar is not without question. *McComb* v. *Jacksonville Paper Co.* (dissenting opinion), 336 U.S. 187, 197.

The opinion of the court in the *Jacksonville* case contains the following comment:

> "Yet if there were extenuating circumstances or if the decree was too burdensome in operation, there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification or construction of the order." 336 U.S. 187, 192.

The opinion of this court in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 421, upholds the right of a court to refuse an injunction when the alleged unlawful acts have been discontinued and it is apparent that the offender has a bona fide intent to comply with the law. By analogy, evidence of like conduct continued over a period of ten years justifies the vacation of an injunction previously granted.

More recently, the Court of Appeals for the Fourth Circuit in *Tobin* v. *Alma Mills*, 192 F. (2) 133, relieved a defendant of an injunction substantially identical with that involved in this action. An interesting fact in that case was that the trial court found, as did the trial court in the case at bar, that the employer was guilty of a technical violation of the injunction, adjudged the employer in contempt, but nevertheless vacated the injunction. On appeal the court held that there was no

technical violation of the injunction, reversed that portion of the decree, but approved the trial court's action in vacating its previous injunction. The basis for the appellate court's finding that there was no violation of the act was that the employees had voluntarily performed work prior to their scheduled hours of work and that the employer should not be held responsible for this voluntary action of its employees. In the case at bar, the only violation found by the trial court was the failure of the employer to keep a technically accurate record of hours actually worked by office employees. This record, which the court found to be technically inaccurate, was made by the affected employees. They signed and kept their own time records, from which entries were made on respondents' books by the identical employees who signed the basic time slips. The Court of Appeals in the *Alma Mills* case said:

> "There is no occasion to dissolve the ordinary injunctive order which merely forbids or commands the doing of a particular act and which loses all practical significance with the passage of a short period of time. When a continuing injunction against the violation of a statute is granted, however, the effect is to place the one against whom it is issued under probation to observe the statute, and to add to the penalties prescribed by law for its violation the additional penalties of fine and imprisonment for contempt of court. This sort of government by injunction should not be unduly extended; and it cannot be said that there is abuse of discretion in dissolving such an injunction when it appears that it has been in effect long enough to accomplish the purpose for which it was granted and that there is no longer any reason to apprehend violation of the statute by the person enjoined." 192 F. (2) 133, 136.

Injunctions under the Fair Labor Standards Act also have been vacated in the following unofficially reported cases: *McComb* v. *Lexington Lumber Co.*, C.C.H. 15 Labor Cases, Par. 64,885 (E.D., S.C., 1948); *Tobin* v. *J. McFadden Neely et al.*, C.C.H. 22 Labor Cases, Par. 67,285 (N.D., Ga., 1952).

If some excuse other than good conduct over a period of ten years and the manifestation of a bona fide intent to comply with the law is necessary in order to justify the court's action in this case, we respectfully invite the court's attention to finding of fact No. 12 (R. 82).

The Government's action in instituting this suit could accomplish no good purpose. No plausible excuse has ever been offered to justify the tremendous expense imposed upon the Government and upon the respondents by virtue of this action. At the time the action was filed the respondents had placed into effect all changes recommended by the Wage and Hour Division (S.R. 15).

These changes included the discontinuance of the guaranteed pay plan and the discontinuance of the system whereby employees recorded their own hours of work. Immediately after the investigator questioned the time records and recommended installation of a time clock, a time clock was purchased and installed (S.R. 15). No further changes in respondents' pay roll practices were sought in the present case. Back pay for the employees does not justify this action, as no request for any such payments was ever made of respondents prior to the present action (S.R. 22). Up until the institution of the suit the Government had not even suggested to the respondents that they possibly were obligated for payment of any additional wages. The present action was calculated to accomplish one thing only—punishment of the respondents—and Government counsel, in the middle of the trial, recognizing the absurdity of the criminal charges, moved for their dismissal (S.R. 26).

The evidence disclosed that the Wage and Hour investigator had solicited employees "to join in the proceedings," offer evidence against their employer, and participate in the monetary benefits expected therefrom (S.R. 3, 4, 27).

The virtual impossibility of satisfying the Wage and Hour Division is reflected by its brief in this case filed in the Court of Appeals. Even though time clocks were purchased and installed on petitioners' request, it was argued in the Court of Appeals that the time clock records were inaccurate because the office girls were not required to clock out if they left their desks for a Coca-Cola (appellants' brief, Court of Appeals, p. 31). Presumably, in the opinion of the Department of Labor, this "misconduct" of the employer would justify a further prosecution for civil or criminal contempt if the injunction be reinstated. Perhaps the trial court felt that it should not continue judicial sanction of such petty harassments.

We will not attempt at this time to review the evidence justifying the trial court's action. We submit that the findings of fact amply support the vacation of the injunction. Petitioners tacitly admit that the proposed change of ownership in the *Alma Mills* case was sufficient to justify the termination of the injunction in that case. There also was a change of ownership in the Little Rock Packing Company. The only difference is that in the latter the change was effected by inheritance rather than by purchase.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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